

Treaty rights, the Indian Act, and the Canadian Constitution: The Supreme Court's 1999 decisions

In 1999 the Supreme Court's constitutional decisions involving Aboriginal peoples related to treaty rights and the validity and effect of certain provisions of the *Indian Act*.¹ Two substantive decisions were handed down in each of these areas. We will start by examining the treaty cases, and then analyze the cases involving the *Indian Act*.

THE TREATY RIGHTS CASES

Both treaty cases involved the interpretation of treaty provisions relating to hunting and fishing rights. In *R. v. Sundown*,² John Sundown was charged with violating provisions of the Saskatchewan *Parks Regulations, 1991*,³ because he had cut down white spruce trees and used them to build a cabin in Meadow Lake Provincial Park without provincial consent. His defence was that he had a treaty right to hunt and fish in the park, and that the cabin was necessary for shelter while he was on hunting and fishing expeditions, and for smoking fish and meat and preparing hides. He relied on the following provision of Treaty 6, entered into in 1876, and adhered to in 1913 by the Joseph Bighead First Nation of Cree Indians, of which Mr. Sundown is a member:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her

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said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said government.⁴

This provision was modified in 1930 by paragraph 12 of the Natural Resources Transfer Agreement,⁵ which took away the treaty right to hunt *commercially* but expanded the geographical area in which the right to hunt *for food* could be exercised.⁶ This modified treaty right was given additional constitutional protection by s. 35(1) of the *Constitution Act, 1982*,⁷ which provides that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁸

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in the park, but contended that the right did not include a right to build a cabin to facilitate hunting. The Supreme Court disagreed. Delivering the unanimous judgment, Cory J. held that building shelters was “reasonably incidental” to the right to hunt and fish, given that the Joseph Bighead First Nation’s traditional method of hunting was “expeditionary”—that is, the hunters would set up a base camp for up to two weeks, from which they would go out in various directions to hunt each day, returning to the camp to dress and preserve the game and fish they caught. This method of hunting requires a shelter, originally a moss-covered lean-to, later a tent, and today a small cabin. This evolution of the kind of shelter was, Cory held, consistent with the Supreme Court’s rejection of a “frozen-in-time” approach to Aboriginal and treaty rights.⁹ Moreover, construction of a cabin would not give the First Nation a proprietary interest in park land. For one reason, if hunting became incompatible with the Crown’s use of the land then hunting would not be allowed, and so any rights in the hunting cabin would be lost, especially as the treaty itself limits the hunting right to lands not “required or taken up for settlement.” Furthermore, in accordance with the *Sparrow* test the treaty right to hunt would be subject to justifiable regulation for conservation, including restrictions on the building of cabins if required to preserve habitat.¹⁰ However, Cory emphasized that, for the infringement to be justifiable, “both the purpose of the regulations and the accommodation of the treaty right in issue would have to be clear from the legislation.”¹¹ He continued:

The Crown would also have to demonstrate that the legislation does not

unduly impair treaty rights. The solemn promises of the treaty must be fairly interpreted and the honour of the Crown upheld. Treaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted.

Cory J. acquitted Mr. Sundown because his treaty right to hunt and fish took precedence over provincial legislation due to s. 88 of the *Indian Act*.¹² That section makes provincial laws of general application apply to “Indians” (as defined in the Act), subject to, among other things, “the terms of any treaty.” As the provisions of the Saskatchewan *Parks Regulations* under which Mr. Sundown had been charged conflicted with his treaty right, s. 88 prevented them from applying to him when exercising that right. Cory therefore found it unnecessary to consider whether s. 35(1) of the *Constitution Act, 1982* would have made the provincial regulations constitutionally inapplicable in the circumstances.

At the end of his judgment, Cory observed that the Crown, in oral argument but not in its factum, had briefly contended that the justification test should apply to allow provincial infringements of treaty rights in the context of s. 88 of the *Indian Act*, as in the context of s. 35(1) of the *Constitution Act, 1982*. The matter had been raised, but left unresolved, by Lamer C.J. in *R. v. Côté*.¹³ While considering the issue to be “important,” Cory also declined to decide it, as there had not been “any significant argument” on it.¹⁴ What is puzzling about this aspect of Cory’s judgment is that, as we have seen, he did suggest that Mr. Sundown’s treaty right to hunt could be infringed by provincial legislation if the infringement could be justified. But given that he held the right to be protected against provincial laws by s. 88, how could infringement occur if there is no justification test implicit in s. 88?¹⁵ This conundrum aside, my own view is that the Court should refrain from reading a justification test into

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s. 88, as, unlike s. 35(1), this is a mere statutory provision that can be amended by Parliament to include a justification test if that is thought to be desirable.¹⁶ While from one perspective it may seem odd that a statute provides more protection to treaty rights than an express recognition and affirmation of those rights in the Canadian constitution, where constitutional rights are concerned the courts tend to balance constitutional protection against parliamentary sovereignty.¹⁷ That balancing exercise is unnecessary in the case of statutory provisions that do not raise constitutional issues, as in that context the courts defer to the wisdom of the legislature.¹⁸

The *Sundown* decision also affirmed and applied principles for the interpretation of treaties that have been repeated by the Supreme Court on numerous occasions. Cory J. quoted the following summary of these principles from his own judgment in the *Badger* decision:

First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. . . . Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises.

No appearance of “sharp dealing” will be sanctioned. . . . Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. . . . Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be “strict proof of the fact of extinguishment” and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.¹⁹

These principles figured prominently in the second Supreme Court case in 1999 involving treaty rights, *R. v. Marshall*. The *Marshall* case actually resulted in two decisions, the first on the merits (hereinafter *Marshall No. 1*²⁰) and the second on an application for a rehearing and a stay of judgment (hereinafter *Marshall No. 2*²¹). We will consider each of these decisions in turn.

The *Marshall* case arose out of charges laid against Donald Marshall Jr., a Mi’kmaq Indian, for using illegal nets to catch eels in Nova Scotia during the closed season and selling them without a licence, contrary to regulations made pursuant to the federal *Fisheries Act*.²² His defence was based on a series of similar treaties entered into by the Crown and the Mi’kmaq villages in Nova Scotia in 1760-61, which contained

a commitment by the Mi'kmaq parties which was expressed in one of the treaties in this way:

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Acadia.²³

Mr. Marshall argued that this provision incorporated both a right to engage in traditional hunting, fishing, and gathering, and a right to trade the products of those activities.

Mr. Justice Binnie, delivering the judgment of the majority of the Supreme Court in *Marshall No. 1*,²⁴ accepted this argument, but limited the right to trade to a right to secure "necessaries," which he construed in today's world as "equivalent to a moderate livelihood."²⁵ Because Mr. Marshall had been "engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse" (the price received for the eels was \$787.10), Binnie J. held that he had been exercising his treaty right.²⁶ As that right is protected by s. 35(1) of the *Constitution Act, 1982*,²⁷ and the Crown had made no attempt to justify infringement of the right by the fisheries regulations, Mr. Marshall was acquitted.

An important aspect of the *Marshall No. 1* decision was the court's use of extrinsic evidence to determine the terms of the treaties. Binnie J. rejected the suggestion made, but not applied, by Estey J. in *R. v. Horse*²⁸ that extrinsic evidence cannot be used where the written terms are unambiguous. As Binnie pointed out, the Supreme Court has distanced itself from Estey's views in a number of more recent decisions.²⁹ Moreover, extrinsic evidence can be used even in a modern commercial context to show that a written contract does not contain all the terms.³⁰ Where Indian treaties are concerned, extrinsic

evidence can be used, even if the written document purports to contain all the terms, to show the historical and cultural context so as to reveal the common intention of the parties.³¹ Also, where a treaty was concluded verbally and then written down by the Crown's representatives, "it would be unconscionable," Binnie said, "for the Crown to ignore the oral terms while relying on the written terms."³²

Binnie J. reached his conclusion that the treaties included a right to hunt, fish, and gather, and to trade the products of those activities for necessities, by examining the historical context and the record of negotiations of the treaties. Cape Breton Island and Quebec had been taken from the French by the British in 1759, and Montreal fell in June, 1760. The British were anxious to maintain peace with the Mi'kmaq, who had been allies of the French and who could be formidable opponents. The British also wanted the Mi'kmaq to continue their traditional economies so they would not become discontented and would not become a burden on the public purse. Moreover, when the treaties were entered into, the Aboriginal leaders asked for truckhouses (trading posts) where they could bring their goods to exchange for the European goods on which they had become dependent. As Binnie observed, "[i]t cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction."³³ He concluded:

The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade.³⁴

Moreover, the honour of the Crown is always involved in its dealings with

the Aboriginal peoples. Binnie did not think that "an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent with the honour and integrity of the Crown."³⁵

Addressing the Crown's concern that "recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources," Binnie repeated that the right was limited to a right to trade for necessities, which in a modern context means for a moderate livelihood. Expanding on this, he said this:

A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities," but not the accumulation of wealth. . . . It addresses day-to-day needs.

Government regulations limiting Mi'kmaq hunting and fishing to what is required for a moderate livelihood would not violate their treaty right, and so would not have to be justified. But regulations that went beyond that and infringed their right to derive a moderate livelihood from those activities would have to be justified in accordance with the *Sparrow* test.

As is well known, *Marshall No. 1* sparked not only controversy, but also turmoil in the Atlantic fisheries. Mi'kmaq fishers naturally interpreted the decision as affirming their treaty right to fish not just eels, but other species as well, for a moderate livelihood. They accordingly began to trap lobsters for that purpose without respecting federal regulations designed to control the lobster fishery. The federal government was apparently unprepared and did not seem to have any policy in place to deal with the situation. In the meantime, some non-Aboriginal fishers reacted angrily, resorting in some instances to property damage and other violent acts that the police apparently did little to prevent or stop. In my opinion, this

amounted to a disgraceful failure by both private citizens and government officials to respect the rule of law where the constitutional rights of Aboriginal peoples are concerned.

In the judicial forum, one of the intervenors in *Marshall No. 1*, the West Nova Fishermen's Coalition, applied to the Supreme Court for a rehearing of the case and an order staying the court's judgment in the meantime. The result was *Marshall No. 2*. In it the court, speaking unanimously, not only dismissed the application, but also provided clarification of its earlier judgment. While *Marshall No. 2* contains interesting comments on the status of an intervenor to bring such an application, we will limit our discussion to the court's clarification of *Marshall No. 1*.

In *Marshall No. 2*, the court specified that its earlier judgment dealt only with the treaty right to

fish, wildlife and traditionally gathered things such as fruits and berries. The word "gathering" in the September 17, 1999, majority judgment was used in connection with the types of resources traditionally "gathered" in an Aboriginal economy and which were thus reasonably in the contemplation of the parties to the 1760-61 treaties.

Accordingly, the earlier judgment did not decide whether the Mi'kmaq have any rights to "gather" other resources, such as timber, minerals, and oil and gas. The court nonetheless observed:

It is of course open to Native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in proceedings where the issue is squarely raised on proper historical evidence, *as was done in this case in relation to fish and wildlife*.

The rest of the *Marshall No. 2* judgment relates mainly to legislative authority to regulate the Mi'kmaq's treaty right. After quoting several passages from its earlier judgment, the court concluded:

The Court was thus most explicit in confirming the regulatory authority of the federal and provincial govern-

The problem with the court's reasoning in this respect is that the treaty rights of the Mi'kmaq to fish are constitutionally protected, whereas any rights non-Aboriginal Canadians may have to participate in the fishery are not. Since when can rights that are not constitutionally protected trump those that are?

ments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives.

The court pointed out that the issue of what regulations might be justifiable was not dealt with in *Marshall No. 1* because the Crown made no attempt to justify the application to Mr. Marshall of the fisheries regulations under which he had been charged. Moreover, the issue of justification cannot be determined apart from a specific context. For example, even if the court were to determine that a closed season was justified for the eel fishery, that would not mean that a closed season for the lobster fishery would be justified.

The court nonetheless went on to reiterate that, as the treaty right in question is limited to providing a moderate livelihood, regulations restricting it to that purpose would not infringe it and so would not require justification. The court continued:

Other limitations apparent in the September 17, 1999, majority judgment include the local nature of treaties, the communal nature of a treaty right, and the fact it was only hunting and fishing resources to which access was affirmed, together

with traditionally gathered things like wild fruit and berries.

The rather cryptic reference to "the communal nature of a treaty right" in this passage is significant, as it appears to relate to an earlier observation in the judgment that "the treaty rights do not belong to the individual, but are exercised *by authority of the local community* to which the accused belongs." If the communal nature of a treaty right is a limitation on the right, then as the emphasized words reveal it is a limitation that is under the authority of the community in which the right is vested. This seems to mean that the community has the authority to determine, and if necessary to limit, how the right is exercised by its members. If this is correct, then a communal right of self-government with respect to the exercise of treaty rights appears to be implicit in the court's judgment.³⁶

On the extent of the legislative authority to regulate the treaty right, the court referred to the general principles laid down in its earlier decisions, especially *R. v. Sparrow*,³⁷ *R. v. Badger*,³⁸ and *R. v. Gladstone*.³⁹ The court distinguished, however, between situations involving Aboriginal rights, which "by definition [were] exercised exclusively by Aboriginal people prior to contact with Europeans," and a treaty right like the one at issue, which was never exclu-

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sive because, at the time the treaty was entered into, non-Aboriginal people were already participating in the commercial and recreational fisheries.⁴⁰ Accordingly, the court said that infringement of the treaty right could be justified, not only for conservation, but also to take account of non-Aboriginal participation. In that context, the court observed that “[p]roportionality is an important factor.”⁴¹ Moreover, as held in previous cases, consultation with the Aboriginal peoples whose constitutional rights are infringed is an important aspect of the justification test.⁴²

In reaching its conclusion that the treaty right to catch and trade fish to obtain a moderate livelihood can be infringed to take account of other participants in the fishery, the court in fact went beyond *Gladstone*. In that case the Heiltsuk Nation in British Columbia proved an Aboriginal right to take herring spawn on kelp in commercial quantities. Lamer C.J., for the majority, held that valid legislative objectives for infringement of that right are not limited to conservation, and can include “the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups.”⁴³ However, in *Gladstone* the Chief Justice explained that the reason why the Heiltsuks’ right to herring spawn does not have complete priority over non-Aboriginal fishing is that, unlike the right to fish for food in *Sparrow*,⁴⁴ the Heiltsuks’ right has no internal limit because it is commercial in nature. But *like* the right in *Sparrow*, the right to fish in the *Marshall* case *does* have an internal limit because only so many fish are required for a moderate livelihood. The court’s conclusion in *Marshall No. 2* that, given that non-Aboriginal people were participating in the fishery at the time the right was created, the Mi’kmaq’s treaty right to fish has never been exclusive, is not a convincing explanation for allowing infringement of the right today for the purpose of taking the participation of non-Aboriginal fishers into account. The problem with the court’s rea-

soning in this respect is that the treaty rights of the Mi’kmaq to fish are constitutionally protected, whereas any rights non-Aboriginal Canadians may have to participate in the fishery are not. Since when can rights that are not constitutionally protected trump those that are?⁴⁵

THE INDIAN ACT CASES

While the *Marshall* case obviously attracted the most attention last year, the Supreme Court’s decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*⁴⁶ is probably much more important, in terms of both its practical and its constitutional significance.

Corbiere involved a direct challenge to a provision of the *Indian Act*⁴⁷ dealing with qualifications to vote for the chief and councillors of a band. Section 77(1) provides:

77.(1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

Certain members of the Batchewana Indian Band in Ontario brought the action, on behalf of themselves and all non-resident members, alleging that s. 77(1) violates s. 15(1) of the *Canadian Charter of Rights and Freedoms*,⁴⁸ cannot be justified under s. 1 of the Charter, and is therefore constitutionally invalid. The facts revealed that 67.2 percent of Batchewana Band members lived off reserve in 1991. Between 1985 and 1991 the numbers of non-resident members had risen dramatically, mainly as a result of Bill C-31,⁴⁹ which conferred Indian status on persons who had lost or were being denied it as a result of discriminatory provisions that were previously in the *Indian Act*.⁵⁰ This trend toward non-residency is continuing.⁵¹

Madam Justice L’Heureux-Dubé delivered a judgment that was concurred in by Gonthier, Iacobucci, and Binnie

JJ. McLachlin and Bastarache JJ., Lamer C.J., Cory and Major JJ. concurring, also delivered a judgment arriving at the same result, but with some differences in reasoning. As L’Heureux-Dubé’s judgment contains a more detailed analysis, and was concurred in on some points by McLachlin and Bastarache, we will look at it first.

L’Heureux-Dubé started by examining the preliminary issue of whether the s. 15(1) analysis should be limited to the application of s. 77(1) to the Batchewana Band, or deal more generally with the application of s. 77(1) to all bands affected by it. She decided that the proper approach was to determine first whether s. 77(1) is unconstitutional in its general application. Only if the answer to this question is no would it be necessary to consider whether the section’s application to the Batchewana Band specifically is unconstitutional, given their special circumstances.⁵²

One of the intervenors, the Lesser Slave Lake Indian Regional Council, argued that s. 25 of the Charter shields s. 77(1) from s. 15(1). Section 25 provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

L’Heureux-Dubé held that, while “rights or freedoms” in s. 25 is broader than “aboriginal and treaty rights” in s. 35,⁵³ and so may include statutory rights, it had not been shown that s. 77(1) provides rights or freedoms that come under the protection of s. 25. In

The *Corbiere* decision also casts doubt on the constitutionality of other provisions of the *Indian Act* that make distinctions related to residency on reserves.

her words, “the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the ‘other rights and freedoms’ included in s. 25.”⁵⁴ Moreover, because s. 25 had not been shown to apply, she said that it would be inappropriate to articulate, in this case, a general approach to s. 25.

The *Corbiere* decision therefore left some very important issues in relation to s. 25 undecided.⁵⁵

Turning to s. 15(1) of the Charter, L’Heureux-Dubé proceeded through the three-stage analysis set out by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*.⁵⁶ She had no difficulty concluding that the first requirement—namely, differential treatment—was present because s. 77(1) “draws a distinction between band members who live on-reserve and those who live off-reserve, by excluding the latter from the definition of ‘elector’ within the band.”⁵⁷ Although this distinction based on reserve residency is not an “enumerated ground” under s. 15(1), she found it to be a new “analogous ground,” thereby meeting the second stage of the *Law* analysis.

However, while concluding that “off-reserve band member status” is an analogous ground not only insofar as s. 77(1) is concerned, but also “in any future case involving this combination of traits,” L’Heureux-Dubé was careful not to make any “findings about ‘residence’ as an analogous ground in contexts other than as it affects band members who do not live on the reserve of the band to which they belong.”

Proceeding to the third stage of the *Law* analysis—namely, the requirement that the differential treatment be discriminatory—L’Heureux-Dubé found that it was in this case. After detailed examination of this issue, she summarized her reasons in a manner that drew on her analysis at the second stage:

The people affected by this distinction, in general, are vulnerable and disadvantaged. They experience stereotyping and disadvantage as Aboriginal people and band members living away from reserves.

They form part of a “discrete and insular minority” defined by race and residence, and it is more likely that further disadvantage will have a discriminatory impact upon them. Second, the distinction in question does not correspond with the characteristics or circumstances of the claimants and on-reserve band members in a manner which “respects and values their dignity and difference”: *Law, supra*, at para. 28. . . . Third, the nature of the interests affected is fundamental.

However, L’Heureux-Dubé added that her analysis at this third stage “does not suggest that *any* distinction between on-reserve and off-reserve band members would be stereotypical, interfere with off-reserve members’ dignity, or conflict with the purposes of s. 15(1).”⁵⁸ She pointed out that Parliament could legitimately treat on and off reserve members differently in situations where that is appropriate—for example, where matters of purely local concern such as taxation on reserve or regulation of traffic are concerned.

L’Heureux-Dubé accordingly concluded that s. 77(1) violates the right to equality in s. 15(1) of the Charter. Moreover, she held that this conclusion applies generally; it is not related to the specific circumstances of the Batchewana Band. She then considered whether the violation could be justified under s. 1 of the Charter. She found that the legislative objective behind s. 77(1)—namely, that “those with the most immediate and direct connection with the reserve have a special ability to control its future”—is pressing and substantial, as required by the first part of

the s. 1 analysis.⁵⁹ Turning to the second part of that analysis, she found a rational connection between that objective and restricting voting to reserve residents, as members living on reserve have a more direct interest in many of a band council’s functions than those living off reserve. However, the minimal impairment requirement in the s. 1 analysis was not met by s. 77(1), as it was not shown that “a *complete* exclusion of non-residents from the right to vote, which violates their equality rights,” was necessary to give effect to the valid legislative objective.⁶⁰

As the violation of s. 15(1) had not been justified under s. 1, L’Heureux-Dubé found s. 77(1) to be unconstitutional insofar as it denies voting rights to non-resident band members.

She then turned to the matter of the appropriate remedy. She decided first of all that a constitutional exemption that would exempt only the Batchewana Band from application of the unconstitutional portion of s. 77(1) was not appropriate, given that the invalidity applied generally to all bands. Nor would it be appropriate for the court to “read in” voting rights for non-residents, as that would require a detailed scheme that would allow them to be voters for some purposes but not others. Instead, L’Heureux-Dubé concluded that “the appropriate remedy is a declaration that the words ‘and is ordinarily resident on the reserve’ in s. 77(1) are invalid, and that the effect of this declaration of invalidity be suspended for 18 months.” The suspension was to give the Canadian government time to consult with the people affected and to respond to their needs in a way that respects equality

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rights, and to give Parliament an opportunity to modify s. 77(2) as well, which, L'Heureux-Dubé suggested, suffers from the same constitutional defect.⁶¹

McLachlin and Bastarache JJ., in their judgment in *Corbiere*, agreed with L'Heureux-Dubé that s. 77(1) violates s. 15(1) of the Charter because it “makes a distinction that denies equal benefit or imposes an unequal burden” in a way that discriminates on an analogous ground.⁶² However, they emphasized that once accepted by the court, an analogous ground, like an enumerated ground, will always be a marker of discrimination, though legislation that distinguishes on that ground will not necessarily be discriminatory—that depends on the context.

Accordingly, they said, “if ‘Aboriginality-residence’ is to be an analogous ground (and we agree with L'Heureux-Dubé J. that it should), then it must always stand as a constant marker of potential legislative discrimination, whether the challenge is to a governmental tax credit, a voting right, or a pension scheme.”⁶³ However, one still has to determine “whether the distinction amounts, in purpose or effect, to discrimination on the facts of the case.” Like L'Heureux-Dubé, McLachlin and Bastarache concluded that s. 77(1) discriminates against non-resident band members generally.

Having concluded that the residency requirement in s. 77(1) violates s. 15(1) of the Charter, McLachlin and Bastarache considered the application of s. 1. Like L'Heureux-Dubé, they found a rational connection between the objective of the legislation and residency, but like her concluded that the requirement of minimal impairment had not been met. “Even if it is accepted that some distinction may be justified in order to protect legitimate interests of band members living on the reserve,” they said, “it has not been demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through

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the democratic process of elections is necessary.” Accordingly, they found that the violation of s. 15(1) equality rights had not been justified. They agreed that the appropriate remedy was to declare the words “and is ordinarily resident on the reserve” in s. 77(1) to be constitutionally invalid, but suspended the implementation of that declaration for 18 months.

The *Corbiere* decision will have a dramatic effect on band council governments under the *Indian Act*. In First Nations like the Batchewana Indian Band, where a majority of band members live off reserve, the extension of even limited voting rights to those non-resident members will have a significant impact on the politics and the power structure in those communities. Whether the decision will affect Aboriginal governments established outside the confines of the *Indian Act* remains to be seen. In both judgments in the Supreme Court, the justices suggested that it would be open to individual First Nations to present evidence that they have an existing Aboriginal right to restrict voting rights. While these observations were made in the context of the *Indian Act* electoral provisions, they indicate that the Court is of the opinion that there may be Aboriginal rights in relation to governance that can take precedence over the statutory regime in the Act.⁶⁴ This may be an indication, like the references to communal rights and Aboriginal decision-making authority in *Marshall No. 2* and *Delgamuukw v. British Columbia*,⁶⁵ that the Court will

be open to claims to Aboriginal governance rights in the future.⁶⁶

The *Corbiere* decision also casts doubt on the constitutionality of other provisions of the *Indian Act* that make distinctions related to residency on reserves. For example, s. 87(1) exempts reserve lands and personal property of Indians and Indian bands situated on reserves from taxation. Given that the Supreme Court has held that reserve residency is an analogous ground under s. 15(1) of the Charter, this provision is now open to question, as the imposition of some taxes, like sales tax, can depend on residency in this context. If resident band members can avoid taxation while non-resident band members cannot, this situation would seem to fall within the new analogous ground the court created in *Corbiere*. If so, it would be up to a court to decide if this differential treatment is discriminatory in the circumstances.

Finally, there is the issue of services, such as health care, provided by the federal government to band members who reside on reserves, but generally denied by that government to non-resident band members. In a federal government “Backgrounder” on the *Corbiere* decision, this statement appears:

The Court was very clear that its decision relates only to the constitutionality of voting distinctions. It does not address any other issues, such as the extension of entitlements to off-reserve Band members or issues of federal or provincial jurisdiction.⁶⁷

However, while the court did not address matters like the constitutionality of differential provision of services, it did hold that reserve residency is now an analogous ground for all purposes. Thus, the question whether provision of services on the basis of reserve residency is constitutional should depend, like the voting rights in *Corbiere*, on whether that is discriminatory. If I were advising the federal government, I do not think I would be overly confident about the answer. ❁

1 R.S.C. 1985, c. I-5.

2 [1999] 2 C.N.L.R. 289.

3 R.R.S., c. P-1.1, reg. 6.

4 Treaty 6, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), 351, at 353.

5 Entered into by the Saskatchewan and Canadian governments, and given constitutional force by the *Constitution Act, 1930*, R.S.C. 1985, app. II, no. 26. Paragraph 12 provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

6 *R. v. Sundown*, above note 2, at para. 8, following *R. v. Horseman*, [1990] 1 S.C.R. 901.

7 Being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

8 See *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.).

9 *R. v. Sundown*, above note 2, at paras. 27-33.

10 *Ibid.*, at paras. 34-39. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Supreme Court decided that the Aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* can be infringed by legislation if the Crown can prove a valid legislative objective such as conservation, and can show that the Crown's fiduciary obligations to the Aboriginal people in question have been respected. The *Sparrow* test was applied to a treaty right to hunt in the context of the Alberta Natural Resources Transfer Agreement, which contains a provision identical to para. 12 of the Saskatchewan Agreement (see above note 5), in *R. v. Badger*, above note 8.

11 *R. v. Sundown*, above note 2, at para. 46.

12 Above note 1.

13 [1996] 4 C.N.L.R. 26 (S.C.C.), at para. 87.

14 *R. v. Sundown*, above note 2, at para. 48.

15 Perhaps Cory J. meant that provincial laws relating to conservation of game could infringe treaty rights through the operation of para. 12 of the Natural Resources Transfer Agreement, without reference to s. 88, as he had held in *R. v. Badger*, above note 8. That case involved provisions of the Alberta *Wildlife Act*, S.A. 1984, c. W-9.1, which were clearly game laws within the meaning of para. 12, whereas the regulations under which the accused had been charged in *Sundown* were not game laws as such. However, Cory suggested in *Sundown*, above note 2, at para. 45, that the regulations could relate to conservation of game, and it was in this context that he said that infringement might be justified.

16 Lamer C.J. suggested in *R. v. Côté*, above note 13, at para. 87, that this is an appropriate matter for Parliament to consider.

17 See *R. v. Sparrow*, above note 10, and commentary thereon in Kent McNeil, "Envisaging Constitutional

Space for Aboriginal Governments" (1993) 19 *Queen's L.J.* 95.

18 See *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at 303.

19 *R. v. Badger*, above note 8, at para. 41, as quoted in *R. v. Sundown*, above note 2, at para. 24.

20 *R. v. Marshall*, [1999] 4 C.N.L.R. 161.

21 *R. v. Marshall*, [1999] 4 C.N.L.R. 301.

22 R.S.C. 1985, c. F-14.

23 Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which the trial judge accepted as applicable to the case.

24 Lamer C.J. and L'Heureux-Dubé, Cory, and Iacobucci J.J. concurred. McLachlin J., Gonthier J. concurring, dissented.

25 *Marshall No. 1*, above note 20, at para. 7.

26 *Ibid.*, at para. 8.

27 See above notes 7 and 8 and accompanying text.

28 [1988] 2 C.N.L.R. 112, at 124-26.

29 *Marshall No. 1*, above note 20, at paras. 13-14, citing *R. v. Sioui*, [1990] 1 S.C.R. 1025, *R. v. Badger*, above note 8, and *R. v. Sundown*, above note 2, among other cases.

30 *Marshall No. 1*, above note 20, at paras. 10 and 43.

31 *Ibid.*, at para. 11.

32 *Ibid.*, at para. 12, relying on Dickson J.'s judgment in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at 388.

33 *Marshall No. 1*, above note 20, at para. 19.

34 *Ibid.*, at para. 35. At para. 44, Binnie relied on *R. v. Sundown*, above note 2, as well as *Simon v. The Queen*, [1985] 2 S.C.R. 387, as authority that to make an express treaty right to hunt effective other rights can be implied (in *Sundown*, the right to build shelters; in *Simon*, the right to carry a gun and ammunition).

35 *Marshall No. 1*, above note 20, at para. 52.

- 36 For a similar expression of communal decision-making authority with respect to Aboriginal title to land, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, per Lamer C.J. at para. 115, commented on in Kent McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" (1998), 5 *Tulsa J. Comp. & Int'l L.* 253, at 285-91.
- 37 Above note 10.
- 38 Above note 8.
- 39 [1996] 4 C.N.L.R. 65.
- 40 *Marshall No. 2*, above note 21, at paras. 38 and 41.
- 41 *Ibid.*, at para. 42.
- 42 *Ibid.*, at para. 43.
- 43 *R. v. Gladstone*, above note 39, at para. 75. For critical commentary, see Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 *Constitutional Forum* 33.
- 44 Above note 10. In *Sparrow* the court held that the Musqueams' right to fish for food has to be given priority over commercial and sports fishing, so if there are only enough fish for their food fishery in a given year after the requirements of conservation have been taken into account, they are entitled to the entire allowable catch.
- 45 See McLachlin J.'s dissenting judgment in *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 (S.C.C.), especially at paras. 306-316, where she questioned Lamer C.J.'s majority judgment in *R. v. Gladstone*, above note 39, in similar fashion.
- 46 [1999] 3 C.N.L.R. 19.
- 47 Above note 1.
- 48 Part I of the *Constitution Act, 1982*, above note 7.
- 49 *An Act to Amend the Indian Act*, S.C. 1985, c. 27.
- 50 For example, status was restored to Indian women who had lost it because they married non-Indian men, and the children of those women received status: for discussion, see Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (Ottawa: Minister of Supply and Services Canada, 1996), 24-53.
- 51 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, per L'Heureux-Dubé J. at para. 30.
- 52 *Ibid.*, at para. 46. L'Heureux-Dubé pointed out that, if the court held s. 77(1) to be unconstitutional with respect to the Batchewana Band rather than generally, the appropriate remedy would be a constitutional exemption from the application of the section to them.
- 53 See above notes 7 and 8 and accompanying text.
- 54 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 52.
- 55 For analyses of s. 25, see Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988); William Pentney, "The Rights and Freedoms of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Part I: The Interpretive Prism of Section 25" (1988), 22 *U.B.C. L. Rev.* 21.
- 56 [1999] 1 S.C.R. 497, at para. 88.
- 57 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 57.
- 58 *Ibid.*, at para. 94 (emphasis in original).
- 59 *Ibid.*, at para. 99. She relied on the approach to s. 1 established in *R. v. Oakes*, [1986] 1 S.C.R. 103, and refined and applied in *Egan v. Canada*, [1995] 2 S.C.R. 513; *Eldridge v. British Columbia (Attorney-General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3.
- 60 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at para. 103 (emphasis in original).
- 61 Section 77(2) provides: "A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section." On the meaning of "section" in this provision, see s. 74(4) of the Act, providing that reserves can be divided into electoral sections for voting purposes.
- 62 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, above note 46, at paras. 4-6.
- 63 *Ibid.*, at para. 10. However, McLachlin and Bastarache were careful to point out at para. 15 that the situation of Aboriginal people with respect to reserve residence is unique, given the profound importance and effect of what they called "reserve status"; "[t]hus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground."
- 64 L'Heureux-Dubé J. said a band could challenge the application of the Act's electoral rules to it by demonstrating an Aboriginal or treaty right to restrict voting rights: *ibid.*, at para. 112. McLachlin and Bastarache said that, "[i]f another band could establish an Aboriginal right to restrict voting, . . . that right would simply have precedence over the terms of the *Indian Act*": *ibid.*, at para. 22.
- 65 See above note 36 and accompanying text.
- 66 See also *R. v. Pamajewon*, [1996] 4 C.N.L.R. 164 (S.C.C.), and discussion of that decision in McNeil, above note 36, at 281-85.
- 67 Canada, "First Nation Voting Regulations to be Amended After Consultations," *Backgrounders*, December 17, 1999 (QL).